

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,340

338

ARTHUR LOYLD WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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C.A. No. 313-66
(Cr. No. 507-64)

QUESTIONS PRESENTED

1. Does testimony by a co-defendant which contained elements which might be in some measure unfavorable to appellant but which was clearly not designed to implicate appellant in the offense charged provide a sufficient basis on the record of this case for appellant's belated allegation that a conflict of interest thus developed between himself and his co-defendant which rendered ineffective the assistance of his counsel who also represented his three co-defendants and that a hearing on the issue was therefore required before appellant's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 could properly be denied, where there were apparent tactical advantages in joint representation by his retained counsel, who also represented him on appeal and in other cases for an extended period after trial, and where the testimony of the co-defendant was thoroughly impeached by the prosecutor and he was convicted?

2. Is appellant's allegation that various omissions by his trial counsel rendered his professional assistance ineffective sufficiently buttressed by specific factual allegations to raise a genuine issue of material fact whose resolution requires an evidentiary hearing before his motion to vacate sentence could properly be denied?

INDEX

	Page
Counterstatement of the Case	1
Statute Involved	2
Summary of Argument	3
Argument:	
I. Appellant has not made a sufficient showing that his co-defendant's testimony created a conflict of interest which prevented his effective representation by trial counsel retained by them both to raise an issue requiring resolution at a hearing	4
II. Appellant's conclusory allegation that various omissions by his counsel rendered his assistance ineffective is not sufficiently buttressed by specific factual allegations to raise a genuine issue of material fact whose resolution requires a hearing	11
Conclusion	17

TABLE OF CASES

* <i>Adams v. United States</i> , 95 U.S. App. D.C. 354, 22 F.2d 45 (1955)	16, 17
<i>Barker v. United States</i> , 227 F.2d 431 (10th Cir. 1955)	15
* <i>Bolden v. United States</i> , 105 U.S. App. D.C. 259, 266 F.2d 460 (1959)	17
<i>Brink v. United States</i> , 202 F.2d 4 (10th Cir.), cert. denied, 345 U.S. 1001 (1953)	11
* <i>Burton v. United States</i> , 80 U.S. App. D.C. 208, 151 F.2d 17 (1945), cert. denied, 326 U.S. 789 (1946)	6
* <i>Campbell v. United States</i> , 122 U.S. App. D.C. 143, 352 F.2d 359 (1965)	7, 9
<i>Case v. North Carolina</i> , 315 F.2d 743 (4th Cir. 1963)	9
<i>Catalano v. United States</i> , 298 F.2d 616 (2d Cir. 1962)	13
<i>Craig v. United States</i> , 217 F.2d 355 (6th Cir. 1954)	9
<i>Davis v. United States</i> , 311 F.2d 495 (7th Cir. 1963), cert. denied, 374 U.S. 846 (1963)	16
* <i>Diggs v. Welch</i> , 80 U.S. App. D.C. 5, 148 F.2d 667, cert. denied, 325 U.S. 889 (1945)	12
* <i>Edwards v. United States</i> , 103 U.S. App. D.C. 152, 256 F.2d 707, cert. denied, 358 U.S. 847 (1958)	12, 13, 15
* <i>Evans v. United States</i> , 346 F.2d 512 (8th Cir.), cert. denied, 382 U.S. 881 (1965)	12, 13
<i>Farris v. Hunter</i> , 144 F.2d 63 (10th Cir. 1944)	8
* <i>Glasser v. United States</i> , 315 U.S. 60 (1942)	5, 7, 9
<i>Gonzales v. United States</i> , 314 F.2d 750 (9th Cir. 1963)	10

II

Cases—Continued	Page
<i>Goodwin v. United States</i> , 121 U.S. App. D.C. 9, 347 F.2d 793 (June 28, 1965), cert. denied, 382 U.S. 920 (1965).....	1, 5, 13
(<i>William J.</i>) <i>Hairston v. United States</i> , — U.S. App. D.C. —, 359 F.2d 271 (1966)	12
* <i>Hall v. United States</i> , 98 U.S. App. D.C. 341, 235 F.2d 838, cert. denied, 352 U.S. 936 (1956)	12, 16
<i>Hayes v. United States</i> , 305 F.2d 540 (8th Cir. 1962)	13
* <i>Hayman v. United States</i> , 205 F.2d 891 (9th Cir. 1953), on remand from 342 U.S. 205 (1952), cert. denied, 346 U.S. 860 (1953)	7
<i>Heisler v. United States</i> , 321 F.2d 641 (9th Cir. 1963)	17
* <i>Jones v. United States</i> , 103 U.S. App. D.C. 326, 258 F.2d 420, cert. denied, 357 U.S. 932 (1958)	13, 17
* <i>Jordan v. United States District Court for the District of Columbia</i> , 98 U.S. App. D.C. 160, 233 F.2d 362, cert. denied, 352 U.S. 904 (1956)	16
<i>Martin v. United States</i> , 101 U.S. App. D.C. 329, 248 F.2d 651 (1957)	13
* <i>Mitchell v. United States</i> , 359 F.2d 833 (7th Cir. 1966)	16
* <i>Mitchell v. United States</i> , 104 U.S. App. D.C. 57, 259 F.2d 787, cert. denied, 358 U.S. 850 (1958)	11
<i>Moore v. United States</i> , 101 U.S. App. D.C. 412, 249 F.2d 504 (1957)	15
<i>Nelms v. United States</i> , 318 F.2d 150 (4th Cir. 1963)	13
<i>Newman v. United States</i> , 105 U.S. App. D.C. 176, 265 F.2d 368, cert. denied, 360 U.S. 905 (1959)	12
* <i>O'Malley v. United States</i> , 285 F.2d 733 (6th Cir. 1961)	16
* <i>Plummer v. United States</i> , 104 U.S. App. D.C. 211, 260 F.2d 729 (1958)	13
<i>Porter v. United States</i> , 298 F.2d 461 (5th Cir. 1962)	7, 17
<i>Sanders v. United States</i> , 373 U.S. 1 (1963)	6
* <i>Smith v. United States</i> , 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), cert. denied, 376 U.S. 957 (1964)	15
* <i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940 (1963)	12
* <i>United States v. Hayman</i> , 342 U.S. 205 (1952)	8, 9
<i>United States v. Paglia</i> , 190 F.2d 445 (2d Cir. 1951)	15
<i>United States v. Pisciotto</i> , 199 F.2d 603 (2d Cir. 1952)	12
* <i>Walker v. United States</i> , 218 F.2d 81 (7th Cir. 1955)	15
<i>White v. United States</i> , 98 U.S. App. D.C. 274, 235 F.2d 221 (1956)	12
<i>Wilkins v. United States</i> , 103 U.S. App. D.C. 322, 258 F.2d 416, cert. denied, 357 U.S. 942 (1958)	17
<i>Wynn v. United States</i> , 107 U.S. App. D.C. 190, 275 F.2d 648 (1960)	11

*Cases chiefly relied upon are marked by asterisks.

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No. 20,340

ARTHUR LOYLD WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On June 8, 1964 appellant Arthur Loyld Williams and three co-defendants were indicted for robbery, housebreaking and carrying a deadly weapon arising out of a robbery which occurred on March 26, 1964. The convictions of appellant, of Paul A. Goodwin, and of Willie M. Vaughn were affirmed by this Court in *Goodwin v. United States*, 121 U.S. App. D.C. 9, 347 F.2d 793 (June 28, 1965), *cert. denied*, 382 U.S. 920 (1965). The conviction of Paul E. Vaughn, the fourth co-defendant, was reversed for lack of evidence. On November 13, 1964 appellant was sen-

tenced to concurrent prison terms of five to fifteen years on the robbery and housebreaking charges, the weapon charge having been dismissed against him at trial. On February 7, 1966 he filed his petition *in forma pauperis* to vacate his sentence pursuant to 28 U.S.C. § 2255. Judge Alexander Holtzoff denied the motion on April 28, 1966 "on the ground that the motion and the files and records of the case conclusively show that the defendant is entitled to no relief." Noting that appellant's principle ground was his counsel's alleged ineffective representation, the judge declared in his order, "There is no showing of lack of effectiveness, except disagreement as to trial tactics, of which an uneducated layman is not competent to judge. Counsel ably and zealously represented his client." From that denial Williams has brought this appeal.

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise

open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

I

Appellant's co-defendant's testimony incidentally put appellant, the witness' brother, Willie Vaughn, and the co-defendant Goodwin in the getaway car at a time and location more proximate to those of the robbery than they had been at the time of their arrest. But, appellee submits, no real conflict of interest between Vaughn and appellant was thus established. The witness Vaughn's testimony was that he had innocently and by chance been picked up by friends, including appellant and Vaughn's brother, at a time not long after the robbery. Since appellant was identified by an eye witness the effect of this

testimony must have been negligible. And in attempting to extricate himself Vaughn made no effort, nor did he need, to implicate his co-defendants in the robbery. His testimony precluded no defense reasonably available to appellant.

But Vaughn's credibility was so utterly destroyed by the prosecutor that Vaughn, who had not been implicated by any witness prior to his arrest in the car, was nevertheless found guilty by the jury. Had appellant been represented by separate counsel, he still could not have prevented Vaughn from taking the stand and telling his story. And separate counsel representing appellant's allegedly antagonistic interest attempted further destruction of whatever was left of Vaughn's credibility, the inevitable effect would have been to link both appellant and Vaughn more securely to the robbery, not to extricate appellant. There was no hope of securely establishing Vaughn's entry into the car at a later time, since the prosecutor had emphasized Vaughn's vagueness in that respect beyond peradventure. Thus the absence of cross-examination or the possible reduction of the impact of Vaughn's testimony, whatever that might have been, which constituted the only prejudice appellant claims to have suffered, were surely outweighed by the availability of coordinated preparation and presentation of the various defenses and the chance to elicit Vaughn's story first on direct examination. These considerations appear to preclude any genuine conflict of interest. And no material factual issues outside the record need be resolved at a hearing.

II

Appellant's trial counsel's various omissions which appellant now contends rendered his counsel's assistance ineffective were for the most part in the nature of tactical decisions and the exercise of professional judgment and thus not normally justiciable. The record shows that appellant, in any case, has not met the heavy burden which

he must in order to prevail in such a challenge. Putting aside those allegations which in effect were disposed of in earlier proceedings or which are inappropriate grounds for collateral attack, appellant has not sufficiently buttressed his conclusory allegations by specific facts to raise a genuine issue of material fact requiring resolution at an evidentiary hearing. At least some showing, for instance, of what testimony might be expected from allegedly neglected witnesses and why appellant could expect favorable testimony should be required before the machinery of a hearing is set in motion and private individuals inconvenienced. And surely more is required to impeach the advice of counsel not to take the stand than a conclusory allegation that circumstances were not sufficiently favorable for a considered decision and that appellant could have proved his innocence, especially where the evidence against him was strong.

ARGUMENT

- I. Appellant has not made a sufficient showing that his co-defendant's testimony created a conflict of interest which prevented his effective representation by trial counsel retained by them both to raise an issue requiring resolution at a hearing.

(Tr. 12-13, 18-19, 27-28, 30-31, 38, 40-42, 44-47, 51-54, 64, 73-78, 85-86, 93, 97, 108-32, 151)

Appellant was convicted of armed robbery on the testimony of the victim, who positively identified him, and the testimony of police officers who arrested him and his three co-defendants scarcely an hour after the crime in the booty-laden getaway car which had been seen leaving the scene of the robbery with four Negro male occupants. This was clearly not a case, therefore, in which "the scales of justice were delicately poised between guilt and innocence." Compare *Glasser v. United States*, 315 U.S. 60, 67 (1942). Now that his conviction has been affirmed¹ and he is armed with whatever advantage hind-

¹ *Goodwin v. United States*, *supra*.

sight may give, appellant, as a patently desperate afterthought, impugns the effectiveness of his trial counsel's professional assistance. (Tr. 12-13, 18-19, 27-28, 30-31, 38, 40-42, 44-47, 51-54, 64, 73-78, 85-86, 93.)

The number and character of his complaints, however, give a captious tenor to his contentions which bespeaks dissatisfaction with his well-founded conviction but conveys none of the honest and righteous indignation of one genuinely aggrieved by a lawyer's inexcusable incompetence or neglect. The record itself affirmatively shows that the case was competently tried. See *Burton v. United States*, 80 U.S. App. D.C. 208, 151 F.2d 17 (1945), *cert. denied*, 326 U.S. 789 (1946). "Petitioner [himself] does not contend that counsel was incompetent . . ." ² and ultimately, appellant's allegations are all either inappropriate grounds for collateral attack or are insufficiently supported by factual allegations even to require a hearing. See *Sanders v. United States*, 373 U.S. 1 (1963). The trial court's denial of appellant's petition, therefore, was entirely proper.

After their trial all four co-defendants permitted their same counsel who had been retained for their trial to be appointed by the trial judge to represent them on their *in forma pauperis* appeal to this Court.³ But now appel-

² Appellant's Motion to Set Aside Sentence, p. 8, hereinafter called Motion.

³ The record in the District Court shows that Melvin M. Burton, Jr. entered his appearance as retained counsel on behalf of appellant and his three co-defendants before the United States Commissioner on March 27, 1964, again on April 23, and then again in the District Court on June 12, 1964, when appellant and his three co-defendants were arraigned before Judge John J. Sirica. Mr. Burton was appointed by the trial judge, Alexander Holtzoff, on November 16, 1964 to represent all four defendants on their *in forma pauperis* appeal. Appellee also invites the Court's attention to the fact that Mr. Burton had also entered his appearance for appellant and one or more of these same co-defendants in four other cases: Criminal No. 464 on June 1, 1964 before Judge David A. Pine; Criminal Nos. 485 and 499 on June 5 before Judge Charles F. McLaughlin; and Criminal No. 883 on October 9, 1964 before Judge George L. Hart, Jr. Mr. Burton's appearance, incidentally, was also entered

lant has discovered an alleged conflict of interest between himself and his co-defendant Paul E. Vaughn which he contends prevented his counsel from effectively representing him at his trial. In addition, he contends that the trial judge erred in failing to inquire whether appellant had considered the possibility of such alleged divergent interests among the four defendants in accordance with the dictum contained in *Campbell v. United States*, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965), decision this Court rendered nine months after appellant's trial. The record in this appeal discloses no such inquiry.

But the record does not show as it must under *Campbell* that appellant was deprived of substantial rights either by the lack of such an inquiry or by his counsel's representation of the three other co-defendants who had been arrested with him in the booty-laden getaway car. Appellant has made no showing of an "adverse interest in the case which deprived or tended to deprive . . . [him] of an adequate defense," that left his counsel "in a duplicitous position" or "hobbled and fettered by commitments to others." See *Glasser v. United States*, *supra*; *Hayman v. United States*, 205 F.2d 891, 895 (9th Cir. 1953), on remand from 342 U.S. 205 (1952), *cert. denied* 346 U.S. 860 (1953). Rather, his allegations seem to partake of the "sterile [attack] of a defendant claiming that his lawyer could not give unfettered loyalty to his interests merely because he represented other people, good or bad" Compare *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

in Criminal No. 302-64 on behalf of Paul Vaughn and Willie Vaughn on June 1, 1964 before Judge Pine.

The first sign of dissatisfaction appellee can discover on the part of this appellant with Mr. Burton's representation appears to have been a motion to dismiss his counselor and the indictment on November 12, 1965 which was dismissed by then Chief Judge Matthew F. McGuire in connection with Criminal No. 485-64. After a second letter from appellant conveying a request to dismiss counsel, Mr. Burton withdrew from representation of appellant with leave of the court on June 17, 1966. No charges were ever filed against Mr. Burton as a consequence of appellant's complaint against him filed with the Committee on Admissions and Grievances, United States District Court for the District of Columbia.

Since the only basis he has cited in support of this contention that there was a conflict of interest between himself and the co-defendant Paul Vaughn is contained in the transcript of trial, no evidentiary hearing was necessary before the trial judge could properly reject it. He makes no claim, requiring a hearing, nor could he claim that his counsel was representing the other co-defendants without his knowledge and consent. See *Farris v. Hunter*, 144 F.2d 63 (10th Cir. 1944). Compare *United States v. Hayman*, 342 U.S. 205, 222-23 (1952). The transcript of the trial reveals that the co-defendant Paul E. Vaughn was the only defense witness to testify. His story was simply that he had on a chance invitation got innocently into the getaway car in which he was arrested after and without knowledge of the robbery. Insofar as he may have been believed he incidentally put the car in closer geographic proximity to the robbery than the place of arrest and put the three co-defendants in the car at a time nearer the time of the robbery. But he claimed not to have seen the robbery's booty. Appellant, therefore, makes the initially plausible contention that he was denied effective assistance of counsel because separate counsel "would certainly have attempted to impeach Paul Vaughn [and] sought to reduce the impact of Vaughn's testimony on the ultimate jury determination of Arthur Williams guilt or innocence." (Brief of Appellant, p. 21.) (Tr. 108-28.)

But a very slightly more sophisticated analysis refutes this contention. In the first place, it is incontestable that the jury did not believe Paul Vaughn; it convicted him. Second, separate counsel representing appellant, of course, could not have prevented Vaughn from taking the stand and telling his story. An independent attempt to impeach Vaughn by separate counsel, furthermore, would doubtlessly have been ineffective; at best it would have been cumulative to the prosecutor's efforts, and at worst it would have been damaging to appellant's cause. (Tr. 151.)

The reasons for this are simple. The government had effectively impeached Vaughn's credibility both generally

and specifically. It had shown his recollection or knowledge of time on the evening in question to have been hopelessly vague. Any additional impeachment by Williams, in appellee's opinion, could only have cinched tighter the chain of evidence against appellant, since it would have tended to show, if it did not already, that Vaughn was a liar and had got into the car earlier than he claimed and had in fact participated in the robbery along with appellant and his three co-defendants whom Vaughn practically unavoidably placed in the car at the time of his entry. The possibility that Vaughn's testimony could have been significantly weakened so that the change in effect might have had material bearing on the outcome of the prosecution seems under these circumstances to be literally negligible. See *Glasser v. United States*, *supra*. Compare *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954). (Tr. 114-32.)

Any hope that a destructive cross-examination of whatever the prosecutor had left of Vaughn's credibility by a separate counsel for a co-defendant could not reasonably have been expected to establish that appellant was not in the car, nor convincingly have established that Vaughn had got into the car later than he claimed, nor that the car was at a substantially different and more favorable location than where he claimed to have entered. Nor did Vaughn's testimony in any significant and certainly not in any way remediable by separate counsel run afoul of appellant's defense which obviously had to relate to the ultimate strength of the victim's identification. Appellant has not identified any other reasonable defense it precluded. This was clearly not a case where the defense of one client might only have been pressed to the disadvantage of another. Compare *Glasser v. United States*, *supra*; *United States v. Hayman*, 342 U.S. 205 (1952); *Campbell v. United States*, *supra*; *Case v. North Carolina*, 315 F.2d 743 (4th Cir. 1963). The mere fact that counsel jointly representing several co-defendants might have to advise his clients differently, or make different arguments or take different courses of action as to each surely does

not establish a conflict of interest where, as here, their defenses do not run afoul of each other, the co-defendants do not implicate each other, and the record gives no indication that counsel did not give to the defense of any of them the attention that it required. See *Gonzales v. United States*, 314 F.2d 750 (9th Cir. 1963).

On the other hand separate counsel might have destroyed whatever impression of innocent activity by friends there might have been and substituted a destructive impression of desperation. Appellant ignores the compelling tactical consideration apparent on the face of the record that insofar as Paul Vaughn's testimony worked any disadvantage to appellant, it worked the identical disadvantage to Vaughn's brother, Willie, who was also a co-defendant arrested in the car with Williams. Appellee submits that where the testimony of the co-defendant was simply that he was offered a ride by three men, one of them his brother, the propriety of joint representation is ratified not refuted under such circumstances as appear on this record. Such joint representation with its attendant equal availability of information and helpful coordination obviously permitted closer control in appellant's interest over the direct examination of Paul Vaughn than would have been possible if these two co-defendants had had separate counsel representing antagonistic interests. In the absence of any showing to the contrary, the preparation for and conduct of this trial would, under the ultimate circumstances of the case, appear to have been able to be affirmatively aided. Thus, since it could hardly be disputed that all four defendants were in the getaway car at the time of the arrest, that Paul E. Vaughn did not seek to exonerate himself by implicating appellant in the robbery, that appellant's situation vis-a-vis Paul Vaughn was indistinguishable from that of Willie M. Vaughn, Paul Vaughn's brother, and since there were overriding favorable effects apparent from the record which could be derived from joint representation under the circumstances of this particular case, it is apparent not only that no real conflict of interest has been shown,

but that under the circumstances of this case there were in fact advantages to be gained from the joint representation. See *Wynn v. United States*, 107 U.S. App. D.C. 190, 192, 275 F.2d 648, 650 (1960). An overall view shows that there was no genuine flaw attributable to this joint representation in the fairness of the trial. And appellant's claim of conflict of interest is without substantial factual support. (Tr. 97, 111, 124.)

II. Appellant's conclusory allegation that various omissions by his counsel rendered his assistance ineffective is not sufficiently buttressed by specific factual allegations to raise a genuine issue of material fact whose resolution requires a hearing.

(Tr. 7-8, 24-25, 106-07)

The remainder of appellant's allegations are clearly insufficient even to require a hearing. Appellee contends that a trial counsel who has failed to gain an acquittal in the face of strong evidence and whose performance was deemed able and zealous by the trial judge should not lightly be inconvenienced by having to justify at a hearing every debatable act of judgment gleaned from the record during the enforced leisure of a disgruntled and hypercritical convict. See *Brink v. United States*, 202 F.2d 4, 5-6 (10th Cir.), cert. denied, 345 U.S. 1001 (1953). Nor should private individuals suffer the invasion of their privacy by being forced to appear at such a hearing until some reasonably reliable showing is made that the claims relating to their testimony have some basis. In addition, the trial tactics and judgment which appellant now criticizes have never been justiciable matters for reconsideration by appellate courts on cold records, but rather have been deemed the special responsibility of trial counsel, absent performance of such obviously inadequate caliber, clearly not evidenced by this record, that the court and prosecutor are obliged to intervene because the proceedings against an accused person have deteriorated to a farce and a mockery of justice. *Mitchell v. United States*, 104

U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958); *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945); see *United States v. Pisciotto*, 199 F.2d 603 (2d Cir. 1952). And it is recognized that examination of the trial record can normally satisfactorily determine whether charges of incompetence are insubstantial as appellee contends these by appellant are. *Evans v. United States*, 346 F.2d 512 (8th Cir.), *cert. denied*, 382 U.S. 881 (1965); *Edwards v. United States*, *supra*.

Adequacy of preparation is surely a matter peculiarly within the professional judgment of counsel, elusive of abstract assessment, and indistinguishable for any practical purpose from quality of representation, which is not grounds for collateral attack. The "time consumed in oral discussion and legal research is not the crucial test * * *. The proof of the efficiency * * * lies in the character of the resultant proceedings." *United States v. Bentvena*, 319 F.2d 916, 935 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). Appellant's burden relating to this contention is heavy indeed and his conclusory allegations are clearly insufficient to meet it. *Edwards v. United States*, *supra*; see *Hall v. United States*, 98 U.S. App. D.C. 341, 235 F.2d 838, *cert. denied*, 352 U.S. 936 (1956).

Appellant's waiver of preliminary hearing while assisted by retained counsel would not have resulted in reversal on direct appeal. See (*William J.*) *Hairston v. United States*, — U.S. App. D.C. —, 359 F.2d 271 (1966). The decision may have been tactical. The possibilities of prejudice from the waiver are speculative. Appellant's sole reason for raising the issue was its alleged affect on counsel's preparation. He does not allege that the decision was made without his participation. The contention with its known remedy has not been raised before and may not, therefore, be raised for the first time in this collateral attack. *White v. United States*, 98 U.S. App. D.C. 274, 235 F.2d 221 (1956). Cf. *Newman v. United*

States, 105 U.S. App. D.C. 176, 265 F.2d 368, *cert. denied*, 360 U.S. 905 (1959).

The waiver of his opening statement, where the trial judge denied trial counsel's request to reserve it, was a tactical decision. Appellant does not suggest how he was prejudiced by this waiver, and in appellee's opinion, no suggestion of ineffective assistance is to be found from this source. (Tr. 7-8.)

Likewise, this Court sustained the legality of appellant's arrest and the incident search and seizure. *Goodwin v. United States*, *supra*. The legality of that action may not be scrutinized again on collateral attack. *Plummer v. United States*, 104 U.S. App. D.C. 211, 260 F.2d 729 (1958); *Jones v. United States*, 103 U.S. App. D.C. 326, 258 F.2d 420, *cert. denied*, 357 U.S. 932 (1958). And whether trial counsel in not filing a motion to suppress evidence in advance of trial had accurately assessed the probability of success or was under a misapprehension of the facts need not now be investigated. *Martin v. United States*, 101 U.S. App. D.C. 329, 248 F.2d 651 (1957); see *Edwards v. United States*, *supra*.

Nor would a mere declaration or self-serving proclamation unaccompanied by a factual background that appellant's sentence should be vacated because of mental illness would not entitle him to a sanity hearing. *Evans v. United States*, 346 F.2d 512 (8th Cir.), *cert. denied*, 382 U.S. 881 (1965). Cf. *Nelms v. United States*, 318 F.2d 150 (4th Cir. 1963); *Hayes v. United States*, 305 F.2d 540 (8th Cir. 1962). Compare *Catalano v. United States*, 298 F.2d 616 (2d Cir. 1962). A contention of insanity at the time of the offense is not normally a permissible ground for collateral attack. Appellant's shotgun approach, however, has offered no factual support whatever to show that such a defense could even have been contemplated let alone enough to require the trial court to grant him a hearing. *Plummer v. United States*, *supra*.

Whether appellant should have taken the witness stand to testify in his own behalf was clearly a matter of trial

tactics and subject to counsel's judgment at least where, as here, the record shows that appellant was given a clear opportunity to disregard counsel's advice if he so chose.*

* The record reveals the following colloquy which followed immediately the trial court's denial of the motion for judgment of acquittal:

(AT THE BENCH)

MR. BURTON: Would you allow me three or four minutes to consult with my defendants?

THE COURT: Yes, indeed.

MR. BURTON: Thank you.

(IN OPEN COURT:)

(Pause.)

MR. BURTON: Your Honor, my clients have suggested that perhaps I should ask for a five minute recess in order to consult with them properly.

THE COURT: Well, we won't take a five minute recess, but we will let you take your clients to the cellblock.

MR. BURTON: I would appreciate that.

THE COURT: So that you could consult with them freely, and we will wait.

MR. BURTON: Thank you, Your Honor.

THE COURT: There is no use leaving for five minutes and coming right back.

(Pause.)

MR. BURTON: Thank you for Your Honor's indulgence. May counsel and I approach the bench for one moment, please?

THE COURT: Yes, indeed.

(AT THE BENCH:)

MR. BURTON: I am having considerable difficulty concerning those who do not wish to take the stand and those who do. I think that in order that I protect myself, that the Court should ask them if they desire to take the stand.

THE COURT: Oh, no, that is not my function.

MR. BURTON: Then I will make the statement on behalf of each one of the defendants, and if he changes his mind, then I would ask he be allowed to take the stand.

THE COURT: Yes, but I don't think I should interfere or stand, so to speak, between counsel and his clients.

MR. BURTON: Thank you.

(IN OPEN COURT:)

THE COURT: Now the defense may proceed.

MR. BURTON: If Your Honor please, on behalf of Paul

Cf. Edwards v. United States, supra; United States v. Paglia, 190 F.2d 445, 447 (2d Cir. 1951). Appellant, it should be noted, does not claim that he was unadvised, but merely that the advice was given under less than ideal circumstances. Even if appellant were misled his allegations are insufficient to require relief in this case. See *Smith v. United States*, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), *cert. denied*, 376 U.S. 957 (1964). But the record shows that counsel's conduct was appropriate. A final decision as to each co-defendant in this case, at least in the absence of a showing to the contrary, awaited the close of the government's case which is when the record shows it was made. Moreover, while making the conclusory allegation that he could have proved his innocence, appellant alleges no specific facts regarding what his testimony would have been, or why, when given so clear an option, he did not take the witness stand in disregard of his counsel's advice. In substance appellant seems merely to reiterate the conclusory claim of innocence, resolved against him by the jury, and not cognizable on collateral attack. This is insufficient to support his claim of ineffective assistance of counsel. See *Barker v. United States*, 227 F.2d 431 (10th Cir. 1955). *Cf. Moore v. United States*, 101 U.S. App. D.C. 412, 249 F.2d 504 (1957).

Appellant's last allegations, which relate to his counsel's failure to call certain witnesses, are also insufficiently supported by specific factual allegations, as they must be, to require inquiry and resolution of any conflicts at a hearing. See *Walker v. United States*, 218 F.2d 81 (7th Cir. 1955). He does not allege what those witnesses would have testified, how he knows what the content of their

Goodwin, I have explained to him his rights and he does not desire to take the stand.

On behalf of Arthur Williams, I have explained to him his rights and he does not desire to take the stand.

On behalf of Willie Vaughn, I have explained to him his rights and he does not desire to take the stand.

At this time I do call to the stand Paul E. Vaughn. (Tr. 106-07.)

testimony would have been, or why it would have been favorable, or why his knowledge might be reliable. Failure to detail such facts denies him a hearing. *Mitchell v. United States*, 359 F.2d 833 (7th Cir. 1966); *Jordan v. United States District Court for the District of Columbia*, 98 U.S. App. D.C. 160, 233 F.2d 362, cert. denied, 352 U.S. 904 (1956). Appellant, furthermore, admits in his reply to the government's opposition in the court below that his request to his counsel to call the two eye witnesses came only after the close of the government's case and after the government had not called these two witnesses, only one of which it had succeeded in subpoenaing. There was obviously no need for defense counsel to subpoena them also. The reason for not calling such witnesses, one of whom was the wife of the victim and the other, not served, his young helper, is surely self-evident. The decision not to call such witnesses is clearly a matter addressed to the judgment of the trial attorney. *O'Malley v. United States*, 285 F.2d 733 (6th Cir. 1961). Appellant alleges no facts which if true would tend to show that these witnesses would have given testimony favorable to him. He has thus raised no genuine issue of material fact which required a hearing. *Hall v. United States*, *supra*; *Adams v. United States*, 95 U.S. App. D.C. 354, 222 F.2d 45 (1955). (Tr. 24-25.)

Similarly, the failure of trial counsel to call "Livinia Ruffin," an alleged alibi witness, is similarly unsupported by factual allegations adequately showing if true the witness's identity, the expected content of her testimony, and circumstances tending to show that the claim is not an imaginary one. Appellant does not allege that he informed his counsel of these facts prior to trial. Though he was positively identified as one of the robbers by an eye witness at trial, appellant has made only the conclusory allegation in his petition that his counsel failed to call a witness, unidentified except by name, who could have put him in another part of town at the time of the robbery. See *Davis v. United States*, 311 F.2d 495 (7th Cir. 1963),

cert. denied, 374 U.S. 846 (1963). The need for specific factual allegations under such circumstances is obvious, especially since the decision to call witnesses is normally a tactical one and there is no claim that this witness is newly discovered. *Adams v. United States*, *supra*. Where as here a petitioner fails utterly to substantiate with facts his bare allegation of misconduct of counsel, this Court will not order a hearing. *Bolden v. United States*, 105 U.S. App. D.C. 259, 266 F.2d 460 (1959); *Wilkins v. United States*, 103 U.S. App. D.C. 322, 258 F.2d 416, *cert. denied*, 357 U.S. 942 (1958). It is thus apparent that, in the absence of sufficient factual allegations to support appellant's claims, or even to require a hearing as to those relating to matters outside the record, the trial judge was justified in denying appellant's petition without a hearing and his judgment should therefore be sustained. (*Bernard*) *Jones v. United States*, 103 U.S. App. D.C. 326, 258 F.2d 420, *cert. denied*, 357 U.S. 932 (1958); see *Heisler v. United States*, 321 F.2d 641 (9th Cir. 1963); compare *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

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Assistant United States Attorneys.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,340

519

ARTHUR LLOYD WILLIAMS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 23 1966

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Peter D. Manahan on Brief

Washington, D. C.
November 23, 1966

QUESTION PRESENTED

Whether the District Court erred when it denied without a hearing Petitioner's Section 2255 motion which presented Constitutional claims of denial of effective assistance of counsel, because of a conflict of interest between co-defendants who were represented by the same attorney, and because of the totality of the circumstances, and those claims involved facts which were outside the record?

I N D E X

	Page
STATEMENT OF QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	ii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE CASE.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	13
STATEMENT OF POINTS.....	15
ARGUMENT:	
THE DISTRICT COURT ERRED IN DENYING, WITHOUT A HEARING, PETITIONER'S MOTION FOR RELIEF, PURSUANT TO 28 U.S. CODE 2255, WHERE HE PRE- SENTED CONSTITUTIONAL CLAIMS THAT WERE PREDICATED ON CIRCUMSTANCES WHICH WERE OUTSIDE THE RECORD.....	16
A. Petitioner's Allegation, That There Was Such A Conflict Of Interest Be- tween Co-defendants That Joint Representation By An Attorney Re- sulted In Denial Of Effective Assistance Of Counsel, Was Not Con- clusively Rebutted By The File And Records; Therefore, The District Court Erred When It Denied The Petition With- out A Hearing.....	20
B. Petitioner's Allegation, That He Was Denied Effective Assistance Of Counsel Under The Totality Of The Circumstances Surrounding The Trial, Was Not Con- clusively Rebutted By The File And Records, Therefore, The District Court Erred When It Denied The Petition With- out A Hearing.....	25
CONCLUSION.....	29

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Blue v. United States</u> , 119 U.S. App. D.C. 315, 342 F.2d 894 (1964).....	26
* <u>Campbell v. United States</u> , 122 U.S. App. D.C. 143, 352 F.2d 359 (1965).....	23, 24, 25
<u>Close v. United States</u> , 198 F.2d 144 (4th Cir. 1952).....	28
<u>Craig v. United States</u> , 217 F.2d 355 (6th Cir. 1954).....	24
* <u>Edwards v. United States</u> , 103 U.S. App. D.C. 152, 256 F.2d 707 (1958).....	27
* <u>Glasser v. United States</u> , 315 U.S. 60 (1942).....	22, 23
<u>Goodwin v. United States</u> , 121 U.S. App. D.C. 9, 347 F.2d 793 (1965).....	2
<u>Haier v. United States</u> , 334 F.2d 441 (10th Cir. 1964).....	17
<u>Haith v. United States</u> , 330 F.2d 198 (3rd Cir. 1964).....	17
* <u>Lebron v. United States</u> , 97 U.S. App. D.C. 133, 229 F.2d 16 (1955).....	22
<u>O'Malley v. United States</u> , 285 F.2d 733 (6th Cir. 1961).....	28
<u>Reed v. United States</u> , 291 F.2d 856 (4th Cir. 1961).....	17
* <u>Sanders v. United States</u> , 373 U.S. 1 (1963).....	16, 25, 28
* <u>Sawyer v. Brough</u> , 358 F.2d 70 (4th Cir. 1966).....	25
<u>Scott v. United States</u> , 334 F.2d 72 (6th Cir. 1964).....	28

* <u>Smith v. United States</u> , 116 U.S. App. D.C. 404, 324 F.2d 436 (1963).....	26, 28
* <u>Thomas v. United States</u> , 122 U.S. App. D.C. 225, 352 F.2d 701 (1965).....	16
* <u>Turner v. Maryland</u> , 303 F.2d 507 (4th Cir. 1962).. <u>United States v. Gonzalez</u> , 321 F.2d 638 (2d Cir. 1963).....	19 28
<u>United States ex rel Scott v. Davis</u> , 323 F.2d 663 (5th Cir. 1963).....	17
* <u>Wynn v. United States</u> , 107 U.S. App. D.C. 190, 275 F.2d 648 (1960).....	23

Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,340

ARTHUR LLOYD WILLIAMS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Arthur Lloyd Williams was one of four defendants indicted in the United States District Court for the District of Columbia, in Criminal No. 507-64, on charges of house-breaking [one count under D.C. Code 22-1801 (1961)], robbery [one count under D.C. Code 22-2901 (1961)], and carrying a dangerous weapon [one count under D.C. Code 22-3214 (1961)].

On October 7, 1964, after a trial before Judge Holtzoff and a jury, Arthur Williams and his three co-defendants

were found guilty of the housebreaking and robbery charges. Williams was sentenced on November 13, 1964, to a term of not less than five nor more than fifteen years on each charge, sentences to run concurrently. Direct appeal was taken from the judgment of conviction by Arthur Williams [No. 19,002, D.C. Cir.] and his conviction was affirmed. Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965).

On February 8, 1966, Arthur Lloyd Williams filed a Motion to Set Aside Sentence pursuant to Title 28 U.S. Code, Section 2255 (1958) [Civil Action No. 313-66]. On April 22, 1966, the Government filed an Opposition to Motion. The District Court denied Williams' motion on April 28, 1966 without a hearing by a Memorandum Opinion. On May 12, 1966, Williams filed an affidavit for leave to proceed without prepayment of costs, and he made a request for appointment of counsel. This application was denied by the District Court on May 17, 1966, because the appeal was "frivolous and not taken in good faith." The jurisdiction of the District Court was proper under Title 28, U.S. Code, Section 2255. This Court allowed the appeal without prepayment of costs and appointed counsel on July 20, 1966. The jurisdiction of this Court is invoked pursuant to Title 28, U.S. Code, Sections 1291 and 2255 (1958).

Present counsel for Arthur Lloyd Williams was appointed by this Court on October 25, 1966.

STATEMENT OF THE CASE

Petitioner, together with Paul A. Goodwin, Willie M. Vaughn and Paul E. Vaughn, was arrested on March 26, 1964 at about 9:00 p.m. This was approximately an hour after a grocery store in northeast Washington had been robbed. At the presentment the next day the four asked for a continuance for the purpose of obtaining counsel. The group retained Melvin M. Burton, Esquire and thereafter he waived preliminary hearing for them on April 20, 1964. Mr. Burton was subsequently appointed to represent all four defendants by the Court on June 12, 1964.

The grand jury returned indictments against petitioner and the other three men in three counts for (1) housebreaking, (2) robbery, and (3) carrying a dangerous weapon on June 8, 1964, Crim. No. 507-64. Petitioner Williams, Goodwin and the Vaughn brothers entered pleas of not guilty at their arraignment on June 12, 1964. Trial date was set for the week of August 10, 1964 but was continued until October 5, 1964 at the request of the Government made June 25, 1964. Arthur Williams acquiesced to the continuance by affidavit of July 13th. However, it appears from petitioner's pro se Motion to Set Aside Sentence filed February 8, 1966, page 14, that his acquiescence was based on the misunderstanding that the continuance was for Crim. No. 507-64 from the week of October 5 until November or

December, 1964.

The case went to trial before Judge Alexander Holtzoff and a jury on October 6 and 7, 1964. At the trial, Petitioner Williams, Goodwin, and the two Vaughn brothers were represented by their court-appointed attorney, Melvin M. Burton, Esquire. At no time prior to the trial did the defense counsel make a motion to suppress as provided for in the Federal Rules of Criminal Procedure, Rule 41(e). (Tr. T.68). After the United States Attorney had made the Government's opening statement, Mr. Burton waived opening statement on behalf of the petitioner and his co-defendants when the trial judge refused to allow him to reserve (Tr.T.8).

In the course of defense counsel's attempt to probe a Government witness, James F. Turner, on the legality of the arrest of the defendants on March 26, 1964, Mr. Burton submitted to the court a possible excuse for his failure to make a pre-trial motion to suppress.

THE COURT: There wasn't any motion to suppress. If you wanted to raise that question you should have made a motion to suppress.

MR. BURTON: The reason that there wasn't a motion filed is because the best obtainable evidence prior to this trial indicated to me that this was a hot pursuit case, and this is the reason that no motion was filed. (Tr.T. 68).

But the petitioner in his pro se Motion to Set Aside Sentence, page 7, indicated that the excuse given to Judge Holtzoff was untrue.

Moreover, the petitioner charged in his pro se Motion, page 10, that counsel "literally ignored the insanity defense, when it was drawn to his attention by petitioner before trial." The circumstances surrounding this occurrence were not before the District Court when Judge Holtzoff denied Petitioner's pro se motion without a hearing.

Petitioner requested that his counsel subpoena two eye witnesses to the March 26, 1964 robbery who would have brought into issue the accuracy of identifications made by Government's eyewitness. Counsel's reply was they would do you no good." Petitioner's pro se Motion, page 10. The two eye witnesses that the petitioner wished to testify did not appear at trial. The only eye witness to testify was Hyman Cohen who made positive and uncontroverted identification of petitioner. Williams had no witness at trial who raised the issue of identification in his favor. In fact, Williams had no witnesses.

In a similar fashion, defense counsel did not investigate an alibi presented to him by Arthur Williams. Mr. Burton "refused to subpoena one Louvenia Ruffin in petitioner's behalf, who would have placed petitioner in another part of the

city, at the time the crime was allegedly committed." Petitioner's pro se Motion, page 10. Furthermore, Williams alleged that the time spent by Mr. Burton in the preparation of his defense was inadequate. Mr. Burton made the vital decision as to which of his four clients would take the stand in the middle of the trial in five minutes. At the close of the Government's case-in-chief, Mr. Burton requested that a five minute recess be granted so that he might confer with his clients. Certain points raised by Arthur William in his pro se Motion, page 8, might be crystalized by the bench dialogue that occurred between Mr. Burton and Judge Holtzoff concerning which defendants were to take the stand.

MR. BURTON: Your Honor, my clients have suggested that perhaps I should ask for a five minute recess in order to consult with them properly.

THE COURT: Well, we won't take a five minute recess, but we will let you take your clients to the cellblock.

MR. BURTON: I would appreciate that.

THE COURT: So that you could consult with them freely, and we will wait.

MR. BURTON: Thank you, Your Honor.

THE COURT: There is no use leaving for five minutes and coming right back.
(Pause.)

MR. BURTON: Thank you for Your Honor's indulgence. May counsel and I approach

the bench for one moment, please?

THE COURT: Yes, indeed.
(AT THE BENCH)

MR. BURTON: I am having considerable difficulty concerning those who do not wish to take the stand and those who do. I think that in order that I protect myself, that the Court should ask them if they desire to take the stand.

THE COURT: Oh, no, that is not my function.

MR. BURTON: Then I will make the statement on behalf of each one of the defendants, and if he changes his mind, then I would ask he be allowed to take the stand.

THE COURT: Yes, but I don't think I should interfere or stand, so to speak, between counsel and his clients.

MR. BURTON: Thank you. (Tr.T.107)

What happened at the five minute meeting between Mr. Burton, Arthur Williams, Paul Goodwin, Willie Vaughn, and Paul Vaughn is not in the record. Arthur Williams' pro se Motion offers some insight to the conduct between counsel and client. "During the recess counsel stated during a mass of confusion that petitioner could not place himself in the car, therefore petitioner did not take the stand. Petitioner contends that had he taken the stand he (petitioner) would have proved his innocent(sic)." Motion, page 8. The "mass confusion" in the cell block and the lack of attention given Arthur Williams would be the natural product of the circumstances in which

four individuals were attempting to decide whether they would take the stand. The circumstances were trying for Williams, who states that there was "mass confusion" and for Mr. Burton who intimated at the Bench that he was having "considerable difficulty."

After the five minute cell block meeting, Paul E. Vaughn took the stand. Vaughn denied any connection with the crime. (Tr.T. 108,114). In answer to his whereabouts on March 26, 1964, he presented an alibi. Vaughn was compelled to explain his presence in Williams' automobile to make that presence compatible with the alibi that he was proffering. The robbery occurred shortly before 8:00 p.m. (Tr.T.11) Vaughn testified that at 15th and H Streets, Northeast, he got into Arthur Williams' car. This, he testified, happened at 8:15 p.m. (Tr.T. 119) and Paul Vaughn placed Williams, Paul Goodwin, and Vaughn's brother Willie in that car. (Tr.T.111). This was the same car that was seen leaving the vicinity of the robbery at high speed and occupied by four Negro males. (Tr.T.75-78). Consequently, Paul Vaughn, in an attempt to explain his presence in an automobile which was observed so proximately in time and place to the robbery, filled a gap in the Government's case in chief which was greater than an hour in time and in a different quadrant in the city. Significantly,

Vaughn's testimony placed Williams and the others in the suspect car less than fifteen minutes after the robbery and in the same quadrant of the city. Although Paul Vaughn was effectively impeached by the United States Attorney both as to his recollection of the facts as he testified to them, (Tr.T. 114-26), and to his prior convictions (Tr.T.127-28), the jury returned with a finding of guilt for all defendants on the robbery. This gives some basis to the theory that the jury, although rejecting Vaughn's alibi, accepted his placement of Williams in the automobile at a time and place near to the crime. This, then, was the total evidence entered in behalf of Williams at his trial. Arthur L. Williams was found guilty as charged for housebreaking and robbery. (Tr.T. 151). He was sentenced on November 13, 1964 by Judge Holtzoff for a period of five to fifteen years on each of the two counts for which he was convicted. The sentences were to run concurrently.

Appeal was taken from the convictions by Arthur Williams and the other three defendants. C.A.Nos. 19000-19003. Again, Melvin M. Burton, Esquire, appointed by the District Court, represented the appellants before the Court of Appeals. Judgment was set aside in the case of Paul E. Vaughn because of the insufficiency of the evidence to connect him with the robbery. Goodwin v. United States, 121 U.S. App.

D.C. 9, 347 F.2d 793 (1965). Williams' conviction was affirmed.

Thereafter, on February 8, 1966, Arthur L. Williams filed a pro se Motion to Set Aside Sentence pursuant to 28 U.S. Code § 2255; an Affidavit in Support of Application to Proceed Without Prepayment of Costs was filed with the motion in the United States District Court for the District of Columbia. Although inartfully drawn, this motion clearly presented to Judge Holtzoff the grounds for which Williams was petitioning for 2255 relief. Williams claimed: (1) that the trial court failed to apprise Mr. Williams of the possible conflicts in interest between such a large number of defendants, and the inherent dangers in one counsel representing all four of them; (2) that Williams was denied the right of effective assistance of counsel; and (3) that he was denied speedy trial and due process of law. His legal claims were based on occurrences and events which extended far beyond the records and the files of the case.

The Government filed Opposition to Motion to Vacate Sentence Pursuant to 28 U.S. Code 2255 on April 22, 1966. In the Opposition, the discussion of the law was more articulate but the law was applied to the facts as indicated in the record and files. In a search for a conflict of interest the government concluded that such conflict "simply does not appear from

the record in this case." Opposition to Motion, page 5. The government incorrectly concluded that Williams rested on the record and made no allegations concerning conflict of interest. In Williams' Motion is alleged the fact that he could have presented alibi witnesses, that he could have cleared himself from the robbery, and that his identification could have been more artfully questioned. These allegations raise issues which would be impossible to determine from the record and files alone. Other similar references to the record and files made in the Government Opposition create the view that the Opposition was written from the record and that everything necessary to adjudicate the merits of Williams' claims of constitutional deprivation was to be found in the file and records. One such suggestion made is that the primary focus on the issue effective assistance of counsel would be on what actually occurred at trial which raises the inference that this charge stands or falls on the Trial Transcript. Opposition Motion, pages 11, 14. A glance at Williams' Motion shows allegations which could only be tested by finding of facts which do not arise, nor are they resolved in the record.

The Court's memorandum opinion, filed on April 28, 1966, denied Arthur L. Williams' Motion made pursuant to 28 U.S. Code, § 2255. Judge Holtzoff stated that the motion was

denied "on the ground that the motion and the file and records of the case conclusively show that the defendant is entitled to no relief." Prior to the Memorandum Opinion there was no evidentiary hearing and the Court limited its review to the file of the case. There are no findings of fact as to Williams' allegation of conflict of interest; the allegation of ineffective assistance of counsel was dismissed as disagreement as to trial tactics; and there was no expression of the Court's attitude towards Williams' claim of denial of speedy trial and denial of due process except for the general finding "that the defendant is entitled to no relief."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V: "No person shall...be deprived of life, liberty, or property, without due process of law."

U.S. Const., amend. VI: "In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense."

Title 28, U.S. Code, Section 2255 (1964): A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is

entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

* * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

STATEMENT OF POINTS

I. The District Court erred in denying, without a hearing, Petitioner's motion for relief, pursuant to 28 U.S. Code, 2255, where he presented Constitutional claims that were predicated on circumstances which were outside the record.

A. Petitioner's allegation, that there was such a conflict of interest between co-defendants that joint representation by an attorney resulted in denial of effective assistance of counsel, was not conclusively rebutted by the file and records; therefore, the District Court erred when it denied the petition without a hearing.

B. Petitioner's allegation, that he was denied effective assistance of counsel under the totality of the circumstances surrounding the trial, was not conclusively rebutted by the file and records; therefore the District Court erred when it denied the petition without a hearing.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING, WITHOUT A HEARING, PETITIONER'S MOTION FOR RELIEF, PURSUANT TO 28 U.S. CODE 2255, WHERE HE PRESENTED CONSTITUTIONAL CLAIMS THAT WERE PREDICATED ON CIRCUMSTANCES WHICH WERE OUTSIDE THE RECORD.

The law is well settled that the District Court must grant a hearing on a 2255 motion where the allegations in the motion raise Constitutional issues and those allegations cannot be disproved by the record and files. Sanders v. United States, 373 U.S. 1 (1963). The Supreme Court said:

Under that statute [2255], a federal prisoner who claims that his sentence was imposed in violation of the Constitution or laws of the United States may seek relief from the sentence by filing a motion in the sentencing court stating the facts supporting his claim. "[A] prompt hearing" on the motion is required "[u]nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief..."^{1/}

This Court relied on Sanders in Thomas v. United States, 122 U.S. App. D.C. 225, 352 F.2d 701 (1965), where it reversed the District Court's denial without a hearing of a 2255 motion. Judge Danaher, speaking for the Court, reasoned that a

^{1/} Id. at 15. In Sanders the application alleged that the prisoner was incompetent to plead guilty. That claim the Supreme Court held was outside the record.

prisoner must not be denied an evidentiary hearing unless his application is conclusively without merit on the basis of the files and the record.

This fundamental requirement of a full evidentiary hearing in circumstances similar to this case has been recognized by the Federal Courts of Appeal. See Haier v. United States, 334 F.2d 441 (10th Cir. 1964); Haith v. United States, 330 F.2d 198 (3rd Cir. 1964); United States ex rel. Scott v. Davis, 323 F.2d 663 (5th Cir. 1963); Reed v. United States, 291 F.2d 856 (4th Cir. 1961).

In petitioner's pro se Motion to Set Aside Sentence, filed February 8, 1964, Arthur Williams made certain allegations of fact which do not appear in the record. Those allegations were made to support Williams' claim that his sentence was imposed in violation of the Constitution. Specifically, he contended that he was deprived of effective assistance of counsel in contravention of the Sixth Amendment and that he was denied a speedy trial in contravention to the Sixth Amendment and the Due Process Clause of the Fifth Amendment. The speedy trial issue will not be discussed in this brief.

The circumstances described by Williams which form the basis for his Constitutional issues are varied and extend in time from pretrial activity of his counsel to the presentation

of the defense. Williams stated in the Motion that he was unaware of the potential conflicts in interest that might arise when one attorney represents more than one client. In his opinion, the court-appointed attorney failed to investigate the case, and Williams buttresses this accusation on the fact that (1) no pre-trial motion to suppress was made; (2) that counsel failed to subpoena two eye witnesses to the crime charged who would have been in a position to rebut the Government's identification witness; (3) that counsel failed to subpoena an alibi witness for Williams; and finally, (4) that counsel, at trial, represented falsely that the reason for his failure to file a pre-trial motion to suppress was because he believed the facts concerning the arrest fell within the hot pursuit theory. The five minute recess between the government's case in chief and the defense which was to determine which of the defendants was to take the stand is painted by Williams as a mass of confusion. Counsel responded to Williams' questions about taking the stand that since Williams was unable to place himself in the car at the time of the arrest he could not take the stand. The disorderliness of this meeting and subsequent dialogue between Mr. Burton and the Court raises a serious question as to the actual happenings in the cell block during that five minute meeting.

The above allegations, because they are not contradicted

by the record and files, must be assumed to be true. Turner v. Maryland, 303 F.2d 507 (4th Cir. 1962). In the Turner case, the United States Court of Appeals for the Fourth Circuit was confronted with the issue whether the District Court had erred when it denied a state prisoner's habeas corpus motion without a hearing. The Court of Appeals stated: "Since no court has found to the contrary, we must accept the allegations of the petitioner as true for the purposes of this appeal."^{2/} To refuse to accept the truth of the factual allegations of the petitioner for purposes of this appeal would effectively result in findings of those facts contrary to the petitioner without the formality of a hearing. This would severely handicap the petitioner in presenting his Constitutional claims. The gravamen of petitioner's position is that the function of this Court in reviewing the action of the District Court in denying petitioner without a hearing is to determine if the pro se motion raised such issues of fact and claims of law, that the District Court incorrectly found that "the motion and the files and records of the case conclusively show that the defendant is

^{2/} Id. at 509. This action was an appeal from a denial of a habeas corpus action without a hearing. Sentence was attacked on the grounds that the prisoner had been denied effective assistance of counsel at his trial for armed robbery.

entitled to no relief." Memorandum, C.A. No. 313-66, April 28, 1966. So that Williams might show that his petition was not conclusively lacking in sufficiency, he reviews the files, records and petition. From this petitioner will show that there is a substantial question whether petitioner was denied the Constitutional rights he claims were denied him at his trial.

A. Petitioner's Allegation, That There Was Such A Conflict of Interest Between Co-defendants That Joint Representation By An Attorney Resulted In Denial of Effective Assistance of Counsel, Was Not Conclusively Rebutted By the File and Records; Therefore, The District Court Erred When It Denied The Petition Without A Hearing.

Petitioner claimed in his Motion to Set Aside Sentence that there was such a conflict in interest between Paul Vaughn and himself that one counsel could not effectively represent both of them. The conflict was apparent from Vaughn's testimony in which he presented an alibi defense. In his attempt to make the alibi consistent with the fact that he was arrested an hour after the robbery in a car which had been seen speeding from the area of the robbery, Vaughn testified that he was picked up by Arthur Williams and the other defendants at about 8:15 p.m., or less than twenty minutes after the robbery. This testimony had the effect of further corroborating the Government's

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case against Arthur Williams. Not only was Williams identified by one eye witness to the robbery, and not only was he arrested an hour after that robbery in an automobile which had been seen in the vicinity of the robbery, but Vaughn's testimony placed Williams in that suspect car only fifteen to twenty minutes after the robbery. The issue of identification was pursued by defense counsel on cross-examination of Hyman Cohen. Counsel raised a question whether Cohen recalled Arthur Williams simply because of the sweater that he was wearing. The fact that Williams was in the suspect automobile an hour after the robbery was not uncontrovertible corroboration that he had been in that car an hour earlier. However innocuous Vaughn's testimony appeared to Mr. Burton, who was attempting to defend all four defendants, the import of these statements was to close the gap in time of one hour and make it a mere fifteen to twenty minutes. A zealous and alert defense counsel for Arthur Williams would certainly have attempted to impeach Paul Vaughn. He would have sought to reduce the impact of that testimony on the ultimate jury determination of Arthur Williams guilt or innocence. In short, Mr. Burton was cast in an ambivalent role. His task was to give Vaughn's testimony the highest degree of credulity and, coincidentally, to defend the best interests of Arthur L. Williams. With such duties, the ultimate conflict in

positions was inevitable. Williams' right to have an effective advocate was impaired.

The law is clear that effective assistance of counsel is denied where one attorney represents conflicting interests of defendants in criminal proceedings. The United States Supreme Court was confronted with this issue in Glasser v. United States, 315 U.S. 60 (1942). That Court made a forceful statement decrying the situation.

[W]e are clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.^{3/}

This Court, in a series of decisions since Glasser, has stressed that co-defendants are "entitled to be represented by separate counsel...[if] there was some inconsistency in joint representation." Lebron v. United States, 97 U.S. App. D.C. 133, 137, 229 F.2d 16, 20 (1955). To implement this protection, this Court relieved the defendant of the burden of recognizing the

^{3/} Id. at 70. The Court further stated: "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Ibid.

potential conflict and objecting thereto. Wynn v. United States, 107 U.S. App. D.C. 190, 275 F.2d 648 (1960). There is language in Glasser to indicate that the trial judge bears some of the burden in protecting a defendant's right to have representation at trial free of conflicts of interest. Glasser v. United States, supra at 71. This Court recently defined with great clarity the responsibility of the trial judge in this situation. Campbell v. United States, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965). Circuit Judge Washington, speaking for the Court, directed that:

the judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel. We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel.^{4/}

^{4/} Id. at 144-45, 352 F.2d at 360-61.

This Court avoided a rule which would require that every co-defendant must be independently represented in every case. The Campbell Court sought to determine if there was anything that indicated that a co-defendant suffered from sharing an attorney with the other co-defendant. One of the prejudices which was considered by this Court in Campbell was the supposition that, had appellant had individual counsel, he might have cross-examined a co-defendant.

Impliedly, in the language of Campbell regarding the conflict of interest situation which impairs effective representation, the distinction between court-appointed counsel and retained counsel fails. In neither situation is a defendant charged with the "sophistication" to perceive the dangers of joint representation. An earlier federal case determined this issue. In Craig v. United States, 217 F.2d 355 (6th Cir. 1954), the Court said that, "it is immaterial whether such counsel was appointed by the Court or selected by the accused, in the absence of facts constituting a waiver of the right."^{5/} Arthur Williams' position on this issue is unchanged whether he and his three co-defendants retained Mr. Burton or whether the trial court appointed him.

^{5/} Id. at 359.

In Campbell v. United States, supra, upon a finding that the trial judge failed to inform co-defendants of the dangers of joint representation, and further that the appellant was prejudiced by the fact that he shared an attorney, this Court reversed the conviction. This type of prejudice is proper grounds for collateral attack on the conviction. Sawyer v. Brough, 358 F.2d 70 (4th Cir. 1966). Arthur Williams seeks a hearing on this issue. From the facts and the allegations, the issue of conflict of interest is not conclusively rebutted. Therefore, the trial judge erred in denying Arthur Williams' petition without a hearing. Sanders v. United States, supra.

B. Petitioner's Allegation, That He Was Denied Effective Assistance Of Counsel Under The Totality Of The Circumstances Surrounding The Trial, Was Not Conclusively Rebutted By The File and Records, Therefore, The District Court Erred When It Denied The Petition Without A Hearing.

During the course of the trial there were incidents which raised the question whether Melvin M. Burton was rendering to Arthur L. Williams effective assistance of counsel as is guaranteed him by the Sixth Amendment to the Constitution. In Williams' Motion to Set Aside Sentence he lists circumstances from which might be inferred a denial of this basic right. It is the impact of all these circumstances together

rather than the singular effect of each, that caused the proceedings against Arthur Williams to be a farce and a mockery of justice. See Smith v. United States, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963).

From the record in the case Williams' specific allegations are that his trial counsel, Mr. Burton, failed to investigate the case properly before the trial and that as a consequence counsel either ignored or refused to raise the insanity defense; counsel did not subpoena two eye-witnesses to the crime when their identity was made known by Williams; and counsel did not subpoena an alibi witness for Williams. Furthermore, Mr. Burton did not make a pre-trial motion to suppress evidence pursuant to Rule 41(e), Federal Rules of Criminal Procedure. Mr. Burton waived preliminary hearing for Arthur Williams and thereby forewent any possible pre-trial discovery which might have led counsel to a better understanding of the facts. See Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894 (1964). Increased knowledge of the facts surrounding the arrest of Williams might have prompted Mr. Burton to file a motion to suppress since he explained to the trial court that the reason no motion had been made was because he understood that the arrest had been made in hot pursuit. (Tr.T. 68). Lack of these facts certainly prevented Mr. Burton from taking

the position of the active advocate for Arthur Williams regarding the circumstances of his arrest.

At trial Mr. Burton waived opening statement. (Tr.T.8). At a later stage in the proceedings, Mr. Burton experienced difficulty in ascertaining which of his four clients would take the stand. (Tr.T. 106-07). Williams was told by Mr. Burton that since he could not place himself in the car in which he was arrested, Williams should not take the stand. Motion to Set Aside Sentence, filed February 8, 1966, page 8. Petitioner Williams claims that, had he taken the stand, he would have given proof of his alibi. The position in which Mr. Burton was placed when he put Paul Vaughn on the stand had been treated previously. However this conflict of interest is another element to be considered in assessing whether Arthur Williams was denied effective assistance of counsel.

Certainly, anyone of these grounds alone, other than the conflict of interest, would probably fail to establish ineffective assistance of counsel as a matter of law. The failure of counsel to move for the suppression of illegally obtained evidence would appear not sufficient for the relief prayed. Cf. Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (1958).^{6/} Similarly, the failure to call defense

^{6/} This issue is posed in a case before the United States Court of Appeals for the Fourth Circuit. Appellant

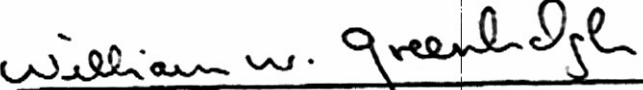
witnesses alone does not establish ineffective assistance of counsel as a matter of law. See United States v. Gonzalez, 321 F.2d 638 (2d Cir. 1963); O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961). Where defendants were advised not to take the stand, ineffective assistance could not be established. Close v. United States, 198 F.2d 144 (4th Cir. 1952). However, it is Arthur Williams' contention that all the circumstances and facts alleged combined to deny him of his "constitutional rights under the Fifth and Sixth Amendments." Motion to Set Aside Sentence, filed February 8, 1966, page 11. The actions and conduct of Melvin Burton, Esquire made the proceedings a farce and a mockery of justice. See Smith v. United States, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963); Scott v. United States, 334 F.2d 72 (6th Cir. 1964). Therefore, from all the circumstances surrounding this trial of Arthur Williams, it cannot be conclusively shown from the file and the records that Williams received effective assistance. The District Court erred when it denied without a hearing Williams' Motion. Sanders v. United States, supra.

Footnote 6 (cont'd) claims that he was denied effective assistance of counsel by counsel's failure to object to illegally seized evidence which was incompetent under state law. Stem v. Turner, Ct. of App. No. 10,734 (4th Cir.), Appellant's Brief.

CONCLUSION

For the reasons set forth in these arguments, the order of the District Court should be reversed and the case remanded for a full evidentiary hearing on Williams' petition with the aid of counsel.

Respectfully submitted,

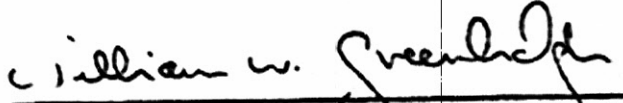


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served, personally, at the Office of the United States Attorney, United States District Courthouse, Washington, D. C. this 23rd day of November, 1966.



WILLIAM W. GREENHALGH